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Waiver of the Fifth: What Level of Incrimination

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WAIVER OF THE FIFTH: WHAT LEVEL OF INCRIMINATION?

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The fifth amendment to the United States Constitution provides in part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This privilege against self-incrimination first restrained the federal government in 1807[1] and now binds the states through the due process clause of the fourteenth amendment.[2] In practice, the privilege allows a witness to refuse to reply to a question that would require an incriminating answer. Although this right to silence has become an integral part of our system of criminal justice,[3] it is not without qualification, and may be lost if a witness voluntarily admits certain incriminating facts. This loss is commonly referred to as a waiver of the privilege.[4]

Two distinct situations are important in considering the context within which a waiver may arise. The first occurs when the witness is initially asked a potentially incriminating question. The witness is given a choice between making an incriminating answer or refusing to answer at all. The issue in this situation is how incriminating the potential answer must be in order for the witness to legitimately claim the privilege against self-incrimination. The second situation arises only after the witness has chosen to answer an incriminating question. Then, it must be decided whether the answer constitutes a waiver of the privilege with respect to further, related questions. Much confusion has resulted from the failure to distinguish between these two situations. It is important to remember that in both it is the incriminating character of the answer that is being measured.

The purpose of this Comment is to demonstrate that the level of incrimination necessary for a witness to assert the privilege rather than answer a question is extremely slight,[5] while the level of incrimination necessary for an

[1] *In re* Willie, 25 F. Cas. 38 (No. 18,692e) (C.C.D. Va. 1807).

[2] Malloy v. Hogan, 378 U.S. 1 (1964).

[3] For an excellent discussion of the privilege, its historical development and its importance in our system of adversary justice, see generally E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); 8 J. WIGMORE, EVIDENCE §§ 2275-78 (J. McNaughton ed. 1961) [hereinafter cited as WIGMORE].

[4] It is clear that a constitutional privilege cannot be waived by one who is unaware of his rights. Such a waiver must be an "intentional relinquishment or abandonment of a known right," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and is "not lightly to be inferred," Smith v. United States, 337 U.S. 137, 150 (1949).

Any admissions must be voluntary and with cognizance of the privilege to remain silent or a waiver will not be found, but it is not clear whether a witness must be actually informed of his rights before a waiver can be held. Some decisions have indicated that such a warning is mandatory if it appears to the court that a witness is unaware of his rights. *E.g.*, United States v. Edgerton, 80 F. 374 (D. Mont. 1897); Starr v. State, 86 S.W. 1023 (Tex. Crim. App. 1905); Leach v. State, 428 S.W.2d 817 (Tex. Civ. App.—Houston [14th Dist.] 1968) (minor child held unable to waive constitutional rights unless warned, with dicta indicating the general principle that a warning is a prerequisite to waiver). *Contra*, United States v. Orta, 253 F.2d 312 (5th Cir. 1958); United States v. Parker, 244 F.2d 943 (7th Cir. 1957); Fuller v. State, 124 Tex. Crim. 321, 61 S.W.2d 825 (1933) (no warning necessary for an admission to be held a waiver).

In the leading case in this area, the Supreme Court found a waiver when there was no showing of warning or of the witness' being represented by counsel at the time the admissions were made. Rogers v. United States, 340 U.S. 367 (1951). It appears that the "knowing and voluntary" character of the waiver is a matter to be determined by the trial judge in light of all surrounding facts and circumstances, since waiver of a constitutional right is to be judged by federal standards. Fay v. Noia, 372 U.S. 391, 439 (1963).

[5] *See* Hoffman v. United States, 341 U.S. 479 (1950), and text accompanying notes 8-13 *infra*.

actual answer to constitute a waiver of the privilege is fairly great.[6] If the "double standard" used to measure the degree of incrimination of an answer in each of these two distinct situations is kept in mind, the following discussion will be more easily understood.

I. ASSERTION OF THE PRIVILEGE

Whenever a witness in a criminal or a civil action asserts his fifth amendment privilege, someone must determine whether the question calls for an answer that is incriminating. Since only the witness knows what his answer would be, the court can only decide whether some potential answer to the question might tend to incriminate. Since any answer might be incriminating in some imaginative future context,[7] the final decision necessarily hinges on the level of incrimination an answer might contain. Clearly the constitutional protection against self-incrimination "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law."[8] Thus mere imaginary possibilities of prosecution are insufficient to allow the witness to plead the fifth. But in *Hoffman v. United States*[9] the Supreme Court said that "this provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure."[10] The Court also stated that the "privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute."[11] Thus the mere relevancy of an answer to possibile prosecution can be a sufficient level of incrimination for a witness to legitimately invoke the privilege.

For example, assume that marijuana is found in the living room of *X*'s apartment. At the trial, the defense calls *X*'s roommate, *Y*, in an effort to direct suspicion of guilt at him. *Y* is asked, "Do you know who owns this marijuana?" Assuming that *Y* is aware of his fifth amendment privilege, he must then make a choice between answering or refusing to answer on the basis of his privilege. Clearly any admission by *Y* that he knew or was familiar with contraband narcotics found in his apartment would be "a link in the chain of evidence" which could be used against him at a later date. Even to answer "Yes, I know who owns it," might be evidence which could be used at a later trial to prove constructive possession and, therefore, would be sufficiently incriminating (in the *Hoffman* sense) for the privilege to attach. This example demonstrates the slight possibility of incrimination which is sufficient for the witness to be allowed to assert the fifth amendment privilege.

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[6] *See* text accompanying notes 34-41 *infra.*

[7] *E.g.*, in Poretto v. United States, 196 F.2d 392 (5th Cir. 1952), the appellate court sustained the witness' claim of privilege with respect to such questions as: "Have you ever been to Houston?" "Are you under indictment?" "Have you ever been to Chicago?" *Id.* at 393. For an excellent discussion of how answers to broad, general questions can incriminate, see Hashagen v. United States, 283 F.2d 345 (9th Cir. 1960). For a determination apparently opposite see United States v. Costello, 222 F.2d 656, 661-62 (2d Cir.), *cert. denied*, 350 U.S. 847 (1955).

[8] Heike v. United States, 227 U.S. 131, 144 (1913).

[9] 341 U.S. 479 (1950).

[10] *Id.* at 486.

[11] *Id.*

If the court recognizes that there is a possibility that an answer might incriminate, then the right of the witness to assert his privilege will be sustained. But if the court rules that an answer could not in any way tend to incriminate, then the witness will be required to answer, no matter how vehemently he claims that his answer will incriminate.[12] In the final analysis it must be for the court "to decide whether any direct answer to [the question] can implicate the witness."[13] Initially, the witness must decide whether to claim the privilege, but whether to allow the plea is always a decision for the court.

II. THE DOUBLE STANDARD OF INCRIMINATION

It is clear that once a witness answers an incriminating question, he may have waived his right to plead the fifth amendment with respect to further, related questions. The determinative factor in this situation is whether the witness' answer is sufficiently incriminating. The purpose of this section is to demonstrate that the level of incrimination necessary for the initial assertion of the privilege is different from the level of incrimination necessary for the subsequent waiver of the privilege.

The leading case in this area is *Arndstein v. McCarthy*,[14] in which an involuntary bankrupt alleged that he neither owned nor had in his possession any stocks or bonds during certain years. He then refused to answer additional questions concerning his ownership of certain other property. The Supreme Court sustained Arndstein's assertion of privilege, stating that since "none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing of guilt, . . . he was entitled to decline to answer further questions when to do so might tend to incriminate."[15]

When Arndstein denied that he owned any stocks or bonds, could he instead have claimed the right to silence? Clearly he could have, because to affirmatively answer such questions of ownership could have subjected him to prosecution for concealment of assets.[16] Applying the test of *Hoffman*, such an admission could "furnish a link in the chain of evidence needed to prosecute."[17] Arndstein failed to claim his privilege initially but the Supreme Court held that the ad-

[12] If the court forces an answer and it is later found that the witness' reply did incriminate him, then the constitutional remedy seems to be that the forced testimony and all evidence secured as a result of it may not be used against the witness in any subsequent criminal prosecution. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969); *cf.* Counselman v. Hitchcock, 142 U.S. 547 (1892). The Supreme Court recently emphasized the importance of protection from the use of forced testimony to seek other evidence under an immunity statute. Reiterating the conceptual validity of Counselman v. Hitchcock, *supra*, the Court upheld a statute which granted "derivative-use" immunity of a forced answer. Kastigar v. United States, 92 S. Ct. 1653 (1972).

[13] Mason v. United States, 244 U.S. 362, 365 (1916).

[14] McCarthy v. Arndstein, 266 U.S. 34 (1924); McCarthy v. Arndstein, 262 U.S. 355 (1923); Arndstein v. McCarthy, 254 U.S. 71 (1920). The case was before the Supreme Court three times, the first two dealing with the issue of waiver of the privilege. The third hearing (1924) was on an issue unrelated to the waiver problem, *i.e.*, whether the constitutional privilege against self-incrimination applied to a bankruptcy hearing. We shall be concerned with the first two hearings in 1920 and 1923.

[15] 262 U.S. 355, 359-60 (1923).

[16] *Id.* at 356.

[17] Hoffman v. United States, 341 U.S. 479, 486 (1950).

missions he did make were not sufficiently incriminating to constitute a waiver of the privilege as to subsequent questions. This case amply illustrates that the level of incrimination necessary for an admission to constitute a waiver of the fifth amendment privilege regarding subsequent questions is higher than that necessary to enable a witness merely to assert the privilege and remain silent. Under the *Arndstein* rationale, a witness may have the right to assert the fifth amendment, choose to answer, and still not be held to have waived his privilege as to future questions.

Judge Learned Hand, speaking for the Second Circuit in *United States v. St. Pierre*,[18] disagreed with the above interpretation of *Arndstein*. St. Pierre testified before a grand jury and admitted embezzling certain funds. He refused to answer further questions concerning the victim of his crime, claiming the privilege against self-incrimination. Held in contempt, St. Pierre brought habeas corpus proceedings, but the district court denied his claim of privilege and held that he had waived it by his admission of the entire crime. On appeal, the Second Circuit held that St. Pierre had waived his privilege by his admission of the crime, and further argued that St. Pierre would have waived his privilege even if his answers had not admitted total guilt. Writing for the court, Judge Hand ignored the double standard doctrine and gave his support to a series of state cases[19] holding that "the disclosure of any act or transaction waives the privilege as to all the details and particulars which will elucidate that act and transaction."[20] Judge Hand argued that if a witness could have claimed the privilege and failed to do so, he has waived his right to claim it at any later date,[21] exactly the position that the Supreme Court seemed to strike down in *Arndstein*.

Judge Frank, dissenting in *St. Pierre*, pointed out the need for a double standard of incrimination, stating that "testimony by a witness, given without objection, leading to disgrace by an admission of criminal conduct, cannot *alone* constitute a waiver of the privilege. Before there is such a waiver, the witness must go further, and . . . testify to facts which put him in danger of punishment."[22] The judge stated the rule as follows:

> A witness may, therefore, at the beginning of a series of dangerous questions, . . . assert the privilege. If, however, he fails to do so early in the course of questioning, and, although he might have then objected, answers some questions which might have a tendency to incriminate him, those answers do not deprive him of the privilege of later refusing to answer further questions which more clearly put him in danger of punishment. That plainly is the doctrine of McCarthy v. Arndstein.[23]

In addition to Judge Hand in *St. Pierre*, several other authorities have argued

[18] 132 F.2d 837 (2d Cir. 1942), *cert. denied*, 319 U.S. 41 (1943).
[19] *Id.* at 839 n.1.
[20] *Id.* at 839.
[21] The case was appealed to the Supreme Court, but certiorari was denied since the issue was moot (St. Pierre having served his sentence). 319 U.S. 41 (1943). Hence, this case is not nearly as authoritative on the subject of waiver as many commentators seem to think. *See, e.g.*, Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 42-45 (1949); Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 324 (1955); *see also* Annot., 147 A.L.R. 255 (1943).
[22] 132 F.2d at 842 (emphasis added).
[23] *Id.* at 843, 844.

against any double standard of incrimination, most notably Professor McCormick.[24] He implies that the level of incrimination necessary for an answer to constitute a waiver of the privilege should be coextensive with the level of incrimination necessary for a witness to be able to elect the privilege: "It seems clear that there is no waiver . . . until the witness discloses a fact that 'incriminates' him, *i.e.*, one that he would have been privileged to refuse to answer."[25]

It is unrealistic to assume that a witness will always know whether any given answer might tend to incriminate. Professor McCormick's argument, that each time a question is asked the witness must weigh the possibility of future incrimination and decide whether to risk waiver by answering, places too much of a burden on a witness who wishes to claim a constitutional right. As Justice Black, dissenting in *Rogers v. United States*,[26] said, such an application of the waiver principle would "make the protection of the privilege depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."[27]

Assuming the levels of incrimination for both assertion and waiver of the privilege are the same, as McCormick contended, the problem would then become whether to make the standard low enough to allow the privilege to be claimed when a potential answer only slightly incriminates, or to make the standard high enough that the privilege will not be waived except in clear cases of incrimination.

If the standard were set too high, the privilege could rarely be claimed. It should be noted, however, that *Hoffman* sets the standard for refusing to answer in the first instance at very little incrimination; therefore, if the standard for asserting the privilege and losing it were the same, as McCormick argues, a witness could waive his privilege by admitting a fact which was hardly incriminating at all.

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[24] C. MCCORMICK, EVIDENCE § 130, at 273 (1954). *See also* UNIFORM RULE OF EVIDENCE 37 (denying the privilege if "he . . . made disclosures of any part"); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 42-49 (1949); Sowle, *The Privilege Against Self-Incrimination: Principles and Trends*, 51 J. CRIM. L.C. & P.S. 131, 137 (1960).

[25] C. MCCORMICK, *supra* note 24, § 130, at 273. In support he cites the cases of McCarthy v. Arndstein, 262 U.S. 355 (1923); United States v. Costello, 198 F.2d 200 (2d Cir. 1952); United States v. Toner, 173 F.2d 141 (3d Cir. 1949); Foster v. People, 18 Mich. 266 (1869). C. MCCORMICK, *supra* note 24, § 130, at 273 n.3. Professor McCormick's cases do not support his position.

As stated above (*see* text accompanying notes 14-17 *supra*) *Arndstein* seems to stand for a proposition exactly the opposite to the one for which Professor McCormick cited it.

Foster v. People, 18 Mich. 266 (1869), has been cited by the Supreme Court three times as authority for a double standard of incrimination. Rogers v. United States, 340 U.S. 367, 374 n.16 (1951); McCarthy v. Arndstein, 262 U.S. 355, 359 (1923); Arndstein v. McCarthy, 254 U.S. 71, 72 (1920). The language of the court in *Foster* is most interesting: "Where a witness has voluntarily answered as to material criminating facts, . . . he can not then stop short . . . but must disclose fully what he has attempted to relate." 18 Mich. at 276. This implies that an admission of less than materially incriminating facts would not constitute a waiver. *See* further discussion in note 69 *infra*.

In United States v. Costello, 198 F.2d 200 (2d Cir. 1952), a witness' voluntary statement that he always upheld the constitution and laws did not open the door to specific questions that might incriminate. It is clear that Costello could have claimed the fifth amendment privilege instead of answering if only because he might have been forced to choose between an admission of guilt and perjury. Thus, the double standard of incrimination was applied.

[26] 340 U.S. 367 (1951).

[27] *Id.* at 378 (Black, J., dissenting).

Viewing McCormick's position pragmatically, the best advice counsel could give a witness would be always to claim the privilege and let the court decide whether a potential answer might tend to incriminate. In light of the liberal definition of incrimination used by the Supreme Court in *Hoffman*, a court will rarely be able to say that an answer could not possibly tend to incriminate, and the witness' claim of privilege will almost always be upheld. As Judge Koelsch said in *Hashagen v. United States*:[28]

> If the privilege and the waiver are coextensive, there would be little left of the privilege, and the witness' peril would be increased to such an extent that he would, and could, stand mute most of the time. By necessary implication, therefore, the 'incriminating facts' which effect a waiver are not identical with the incriminatory implications of a question to which the privilege attaches in the first instance.[29]

Most lower court decisions have likewise recognized the necessity for a double standard of incrimination and have held that an answer must be seriously incriminating before a waiver will be found.[30]

The theory of using two different levels of incrimination regarding the assertion and waiver of the privilege would seem to be the only logical and realistic interpretation possible.[31] Requiring any less than a relatively higher level of incrimination for waiver than for mere assertion of the privilege would be an unreasonably broad interpretation of the waiver doctrine, especially in light of the statement by the Supreme Court that a waiver of the privilege against self-incrimination as guaranteed by the Constitution "is not lightly to be inferred."[32]

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[28] 283 F.2d 345 (9th Cir. 1960).

[29] *Id.* at 353-54 n.9.

[30] *See, e.g.*, Shendal v. United States, 312 F.2d 564 (9th Cir. 1963); Singer v. United States, 244 F.2d 349 (D.C. Cir. 1957); Starkovich v. United States, 231 F.2d 411 (9th Cir. 1956); Jackins v. United States, 231 F.2d 405 (9th Cir. 1956); Grudin v. United States, 198 F.2d 610 (9th Cir. 1952); United States v. Nelson, 103 F. Supp. 215 (D.D.C. 1952); *Contra*, United States v. Courtney, 236 F.2d 921 (2d Cir. 1956) (which is better understood within the context of its companion case, United States v. Gordon, 236 F.2d 916 (2d Cir. 1956) which presented no waiver issue at all); Tillotson v. Boughner, 238 F. Supp. 621 (N.D. Ill. 1965); Sears, Roebuck & Co. v. American Plumbing Supply Co., 19 F.R.D. 329 (E.D. Wis. 1954).

[31] Wigmore states in an early edition of his work: "The only inquiry can be whether, *by answering as to fact X, he waived it* [the privilege] *for fact Y*. If the two are related facts, parts of a whole fact forming a single relevant topic then his answer as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating facts as a whole." 4 J. WIGMORE, EVIDENCE § 2276, at 910 (2d ed. 1923). This sounds very much like McCormick's argument that the levels for both waiver and assertion of the privilege should be coextensive. The later edition, however, takes a somewhat different view:

> Thus the only inquiry can be whether, *by answering as to fact X, he waived it* [the privilege] *for fact Y*. The answer is yes, provided the facts are sufficiently related. The clear case is that in which fact Y is but a detail implying no further self-incrimination—none in addition to that already volunteered by the disclosure of fact X. A more difficult case is that in which facts X and Y are interdependent parts of a whole fact forming a single relevant topic.

8 WIGMORE § 2276, at 456-57. The more recent text was changed significantly to recognize that an incriminating admission could be made to which the privilege might have attached but to which a waiver does not apply.

[32] Smith v. United States, 337 U.S. 137, 150 (1949). *See also* Poretto v. United States, 196 F.2d 392, 394 (5th Cir. 1952).

III. WAIVER OF THE PRIVILEGE[33]

In much cited dictum, the Supreme Court in *Brown v. Walker*[34] stated that if a witness "discloses his criminal connections, he is not permitted to stop but must go on and make a full disclosure."[35] It is now well settled that an admission of certain incriminating facts may constitute a waiver of the privilege with respect to other questions related to that admission.[36] The reasons for such a rule are twofold: first, the right of the state to require its citizens to relate whatever knowledge they may have concerning criminal activity; and second, the concept of fair play, *i.e.*, that a witness who voluntarily tells part should then be required to tell all, especially if a failure to do so would prejudice any party to the action.[37] A contrary rule would sanction the obvious injustice of permitting "a person . . . [to] waive his privilege, . . . and at the same time and in the same proceeding assert his privilege and refuse to answer questions that are to his disadvantage."[38]

The problem of determining the level of incrimination necessary for one answer to waive the privilege as to further questions may be illustrated by using

[33] The principle that an answer to one question could constitute a waiver of the privilege as to other questions is English in origin. It was well established in English jurisprudence by the early nineteenth century that once a voluntary admission had been made, the witness had waived the privilege with respect to the details of that admission. *See* Dandridge v. Corden, 3 Car. & P. 11, 172 Eng. Rep. 300 (K.B. 1827); East v. Chapman, 2 Car. & P. 570, 172 Eng. Rep. 259 (K.B. 1827); Dixon v. Vale, 1 Car. & P. 279, 171 Eng. Rep. 1195 (C.P. 1824). This doctrine was overruled, however, in the subsequent case of Regina v. Garbett, 2 Car. & K. 474, 175 Eng. Rep. 196 (Cr. Cas. Res. 1847), where their lordships held, nine to six, that "it made no difference in the right of the witness to protection that he had before answered in part; their lordships being of opinion that he was entitled to claim the privilege at any stage of the inquiry." 2 Car. & K. at 474, 175 Eng. Rep. at 205. There seem to be no English cases subsequent to *Garbett* that have held to the contrary. *See* Annot., 147 A.L.R. 255, 264-65 (1943). A leading English commentator cites *Garbett* as correct authority: "The witness, if he chooses to answer part of an inquiry, does not waive his right to object to answer subsequent questions." 13 HALSBURY, LAWS OF ENGLAND ¶ 784, at 575 (1910); 13 HALSBURY, LAWS OF ENGLAND ¶ 804, at 730 (1934). However, in 15 HALSBURY, LAWS OF ENGLAND ¶¶ 760-63, at 422-23 (1956) the entire subject of waiver is omitted. Hence, the current English rule seems to be that a witness does not waive the privilege by voluntarily answering in part, but may elect the privilege regardless of any previous admissions. The change in the English rule was never recognized in this country, however, and it has been settled since Foster v. People, 18 Mich. 266 (1869), that when "a witness has voluntarily answered to material incriminating facts, . . . he can not then stop short and refuse further explanation but must disclose fully what he has attempted to relate." *Id.* at 267.

[34] 161 U.S. 591 (1896).

[35] *Id.* at 597.

[36] Rogers v. United States, 340 U.S. 367 (1951). However, not all answers to questions bar a witness from refusing to answer other questions on the same subject. For example, it seems established that "slips of the tongue" immediately retracted, do not waive the privilege. United States v. Weisman, 111 F.2d 260 (2d Cir. 1940). Neither is the privilege waived by denials of guilt or affirmances of innocence. United States v. Lawrenson, 315 F.2d 612 (4th Cir. 1963); Isaacs v. United States, 237 F.2d 657 (5th Cir. 1956); United States v. Costello, 198 F.2d 200 (2d Cir. 1952); United States v. Hoag, 142 F. Supp. 667 (D.D.C. 1956); People *ex rel.* Taylor v. Forbes, 143 N.Y. 219, 34 N.E. 303 (1894) (cited with approval in McCarthy v. Arndstein, 262 U.S. 355, 359 (1923)). But, for denials of guilt that were found to be a waiver in a civil case, see Brown v. United States, 356 U.S. 141 (1958), discussed in the text accompanying notes 82-88 *infra*. It also seems accepted that any records voluntarily surrendered to the Internal Revenue Service may not be reclaimed on fifth amendment grounds until the examination is complete, regardless of any incrimination. *E.g.*, Grant v. United States, 291 F.2d 227 (2d Cir.), *vacated*, 369 U.S. 401 (1961); Glotzbach v. Klavans, 196 F. Supp. 685 (E.D. Va. 1961). *Contra*, Stuart v. United States, 416 F.2d 459 (5th Cir. 1969).

[37] *See* 8 WIGMORE § 2276.

[38] People v. Cassidy, 213 N.Y. 383, 107 N.E. 713, 715 (1915).

the hypothetical given earlier. It is clear that the witness *Y* could have refused to answer the question: "Do you know who owns this marijuana?" If he chose not to claim his right of silence and instead answered by saying, "Yes, I know who owns this marijuana," then the issue would become whether he had waived the privilege with respect to further questions concerning that admission, such as "Do you own the marijuana?" The court must employ some standard to determine whether the first admission is sufficiently incriminating as to constitute a waiver of the fifth amendment privilege for other, related questions.

The Supreme Court has never directly addressed the problem of the level of incrimination necessary for waiver of the privilege.[39] The Court's decisions indicate, however, that any answer which admits less than an element of a crime will not waive the privilege as to further questions,[40] and that any answer which does admit an element will waive the privilege with respect to further questions concerning the details of the element admitted.[41] In the example given above, the knowledge of ownership of marijuana is not an element of the crime of possession of marijuana; thus, the privilege cannot be waived by the admission of such knowledge and may be claimed at any subsequent time.

The policies behind the determination of a waiver of the fifth amendment privilege depend upon the type of proceeding being conducted. For example, in the trial of *X* for murder, a statement by *Y* that he saw *X* at the scene of the crime on the evening in question is highly detrimental to *X*. If *Y* then claims the fifth amendment privilege and refuses to explain that he and *X* were stealing hubcaps that night when they saw the real murderer, *Y*'s claim of privilege has prejudiced *X*'s chances of obtaining acquittal. However, those same statements by *Y* in an inquisitory setting (*e.g.*, a grand jury investigation) would not injure *X* nearly as much since *X* would not then be on trial for his life.

In an adversary hearing, the discovery of all relevant facts is important to the protection of the rights of the parties to the action. It would be unfair to permit a witness to voluntarily place a fact into issue and then refuse to explain or elaborate on his statement by claiming the privilege.[42] In this situation the waiver principle will be more broadly applied and the requisite level of incrimination necessary to constitute a waiver of the privilege should be found more easily.[43] These considerations are not present in an inquisitory setting, where there are no innocent victims of the privilege, and the rights of the witness against self-incrimination will generally prevail over the rights of the inquisitory body to relevant testimony.[44]

Since there are certain policies at work in the application of the waiver

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[39] *See* note 30 *supra*, and accompanying text.

[40] Arndstein v. McCarthy, 254 U.S. 71 (1920); *see* text accompanying notes 45-52 *infra*.

[41] Rogers v. United States, 340 U.S. 367 (1951); *see* text accompanying notes 53-71 *infra*.

[42] *See* text accompanying notes 72-98 *infra*.

[43] For a discussion that reaches the exact opposite conclusion, *i.e.*, that a waiver needs to be more broadly applied in inquisitory settings and is less important as a means of preventing distortion in an adversary hearing, *see* Comment, *Waiver of the Privilege Against Self-Incrimination*, 14 STAN. L. REV. 811, 823 n.44 (1962).

[44] *See* text accompanying notes 45-69 *infra*.

doctrine in adversary proceedings which are not relevant in an inquisitorial setting, the following analysis of the level of incrimination necessary to find a waiver is divided into two broad areas: waiver in an inquisitory setting and waiver in an adversary setting.

Inquisitory Hearings. In an inquisitory setting the issues are not complicated by the right of cross-examination by adverse parties who may be injured by the partial testimony of a witness claiming the privilege against self-incrimination. An inquisitory proceeding is one in which there are no adverse parties and includes, for example, grand jury investigations, administrative hearings, courts of inquiry, coroners' inquests, congressional investigations, and bankruptcy hearings. Here the only problem of waiver is whether the prior testimony waives the privilege with respect to further questions.

Arndstein v. McCarthy[45] is the case most often cited for a definition of the level of incrimination necessary for a witness' answer to constitute a waiver of the privilege in an inquisitory proceeding. Arndstein, an involuntary bankrupt, filed sworn schedules of assets and liabilities showing only one asset: a bank deposit of $18,000. The district judge ordered Arndstein to answer questions concerning the ownership of other property, pointing out that the filed schedules implicitly asserted that Arndstein had no other property and therefore constituted a waiver of his privilege with respect to questions concerning other assets.[46] Arndstein was held in contempt of court for his refusal to answer.[47] The Supreme Court sustained his claim of privilege, holding that since "[t]he schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime . . . [they] did not constitute a waiver of the right to stop whenever the bankrupt could fairly claim that to answer might tend to incriminate him."[48]

The significance of *Arndstein* centers on the Court's statement that there was no waiver because the admissions alone "did not amount to an admission of guilt or furnish clear proof of crime."[49] Does this language mean, as it strongly implies, that a waiver can only be found when an admission is of the entire crime, *i.e.*, all elements necessary for conviction? The purpose of the waiver doctrine (to prevent a witness from stopping short after making some initially incriminating statements[50]) could in no way be furthered by finding a waiver exclusively in an admission of guilt, since the witness would have already admitted the entire crime.[51] In application, this interpretation of the waiver principle (that waiver occurs only when an admission is of complete guilt) has never been accepted or widely used, and waivers of the fifth amendment have continually been held to be caused by admissions of less

[45] McCarthy v. Arndstein, 266 U.S. 34 (1924); McCarthy v. Arndstein, 262 U.S. 355 (1923); Arndstein v. McCarthy, 254 U.S. 71 (1920); *see* note 14 *supra.*

[46] 262 U.S. at 356.

[47] *Id.*

[48] 254 U.S. at 72.

[49] *Id.*

[50] Foster v. People, 18 Mich. 266 (1869); People v. Cassidy, 213 N.Y. 388, 107 N.E. 713 (1915); *see* text accompanying note 37 *supra.*

[51] *See* Rogers v. United States, 340 U.S. 367 (1951), discussed in text accompanying notes 53-71 *infra.*

than all the elements of a crime.[52] *Arndstein*, then, stands only for the proposition that in some instances an admission of less than total guilt will not waive the privilege as to further questions.

In *Rogers v. United States*[53] the Supreme Court attempted to set out a more definitive rule as to the necessary requisites of a waiver of the privilege. Jane Rogers, testifying before a grand jury, freely admitted her membership in and position as the treasurer of the Communist Party of Denver. But when asked to whom she had given the official records, Mrs. Rogers refused to answer, claiming her constitutional privilege against self-incrimination. The district court rejected her claim of privilege and the Supreme Court affirmed her contempt conviction for refusal to answer.[54] Chief Justice Vinson pointed out that the fifth amendment privilege presupposes a real danger of legal detriment from the required disclosure, and hence "petitioners cannot invoke the privilege where response to the specific question in issue . . . would not further incriminate her. Disclosure of a fact waives the privilege as to the details."[55] The Court then made a statement that has thrown all waiver theories into utter confusion: "Requiring full disclosure of details after a witness freely testifies as to a criminating fact does not rest upon a further 'waiver' of the privilege against self-incrimination."[56] Instead, according to the Court, the trial judge must weigh and consider all previous admissions made by the witness, then decide "whether the answer to that particular question would subject the witness to a 'real danger' of further crimination."[57] Thus the Court enunciated the rule that the fifth amendment privilege is never waived but only made inapplicable by the previous disclosures voluntarily made.[58]

Rogers can be read to support either of two different theories of waiver. The first is that waiver occurs when there is no danger of further incrimination; *i.e.*, that there is no real waiver in the ordinary sense of the word, but simply a determination in each case as to whether an answer to any given question will, in fact, tend to incriminate further.[59] The second is that waiver occurs as to

[52] Brown v. United States, 356 U.S. 148 (1958); Rogers v. United States, 340 U.S. 367 (1951); Stuart v. United States, 416 F.2d 459 (5th Cir. 1969); Grant v. United States, 291 F.2d 227 (2d Cir.), *vacated*, 369 U.S. 401 (1961); Singer v. United States, 244 F.2d 349 (D.C. Cir. 1957); Tillotson v. Boughner, 238 F. Supp. 621 (N.D. Ill. 1965); Glotzbach v. Klavans, 196 F. Supp. 685 (E.D. Va. 1961); United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 329 (E.D. Wis. 1954); United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947).

[53] 340 U.S. 367 (1951).

[54] The case was affirmed on three grounds: (1) The claim of privilege was made with respect to records of an organization, which has never been considered a legitimate ground for invocation of the privilege. *Id.* at 371-72. (2) The privilege was claimed in order to protect others from incrimination. Since the privilege is a personal one and only for the protection of the witness, this made the claim untenable. (This ground was reinforced by the fact that the witness originally refused to answer only to protect others, and claimed the fifth amendment only as an afterthought at the second hearing. *Id.* at 371.) (3) There was no reason for the witness to refuse to testify since the requested answer could in no way tend to incriminate further. *Id.* at 373-74. We shall be concerned solely with the third and most important holding of the Court.

[55] *Id.* at 373.

[56] *Id.* at 374.

[57] *Id.*

[58] For an excellent discussion of *Rogers* and the implications of the various principles espoused therein, see Comment, *supra* note 43.

[59] The test should be "whether the answer to that particular question would subject the witness to a 'real danger' of further crimination." 340 U.S. at 374.

details of admitted facts; *i.e.*, that there is a waiver as to the details of an incriminating fact which has already been admitted by the witness regardless of of any further incrimination by those details.[60] While both principles are supported by language from *Rogers*, close analysis demonstrates that the second is the better interpretation of the waiver principle.

The first *Rogers* theory—waiver occurs when there is no danger of further incrimination—may be illustrated by the example of a witness at a grand jury hearing who, when asked "Who owns this marijuana?", answers "I own it." Waiver is then determined by whether his admission of ownership is so incriminating as to eliminate any danger of further incrimination when the witness is asked: "Where did you get it?" If the admission of ownership is so incriminating that there is no danger of further incrimination in answering the second question, then the witness may not plead the fifth amendment privilege but must answer. His privilege has been waived because the answer to the second question could not further incriminate. But if there is any danger of further incrimination from the second question, if would seem that the witness could legitimately claim the privilege.

In the *Rogers* case, the Court decided that the name of Mrs. Rogers' successor in office could in no way further incriminate her since she had already admitted membership in the Party. The Court pointed out that "disclosure of acquaintance with her successor presents no more than a 'mere imaginary possibility' of increasing the danger of prosecution."[61] It is important to note that the Smith Act[62] did not make membership in the Communist Party per se a criminal act. Instead it punished membership in the Party with knowledge of the Party's purposes; *i.e.*, to overthrow violently the Government of the United States. Since Mrs. Rogers had not admitted her knowledge of the Party's goals, she had voluntarily admitted only one element of the offense described by the Smith Act. The Government, in order to convict Mrs. Rogers under that statute, would have to prove the missing element: knowledge.

If we assume, as the Court must have, that the Government had no evidence against Mrs. Rogers other than her own admission, then forcing her to name her successor could have provided the Government with a source of testimony which could lead to proof of Mrs. Rogers' knowledge of the Party's purposes.[63] In addition, since the transcript of the hearing would be admissible at a later proceeding,[64] the mere fact of detailed explanation and reiteration, inherent in forcing the witness to answer, would add to the credibility of the prior incrimi-

[60] "Disclosure of a fact waives the privilege as to the details." *Id.* at 373.

[61] *Id.* at 374-75.

[62] Internal Security Act of 1948, 18 U.S.C. § 2385 (1970).

[63] In fact, the Supreme Court has held, in Counselman v. Hitchcock, 142 U.S. 547 (1892), that a federal immunity statute was unconstitutional because it did not protect a witness from the Government's use of forced testimony (which would have been inadmissible into evidence under the statute) as a source for securing other incriminating evidence which would then have been admissible at subsequent prosecutions. *See also* Kastigar v. United States, 92 S. Ct. 1653 (1972). For a discussion in agreement with this principle, *see* Boudin, *The Constitutional Privilege In Operation*, 12 LAW. GUILD REV. 128, 138 (1952).

[64] It is generally held that an admission by an accused in one proceeding is admissible as evidence against the same accused in a subsequent proceeding. *See* Schoeps v. Carmichael, 177 F.2d 391 (9th Cir. 1949). *See also* 8 WIGMORE § 2276(5), at 472-74.

nating statements.[65] Thus there are two separate ways in which Mrs. Rogers' forced testimony would tend to incriminate further: (1) by giving the prosecution another source of evidence from which they might derive the element of knowledge needed to convict; and (2) by enhancing the credibility of Mrs. Rogers' admission by forcing her to give more details which could be corroborated, thus making it more difficult for her to later deny the truth of her incriminating admissions and making the evidence against her more believable to the jury. While it is easy to understand the Court's desire to force Mrs. Rogers to testify,[66] it is nevertheless difficult to follow the Court's forced reasoning that to do so entailed no danger of further incrimination. Thus the first possible *Rogers* rule is unworkable[67] and probably should not have resulted in a waiver of the privilege even in the *Rogers* case itself.[68]

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[65] "It can be argued that reiteration of the prior voluntary statement is not incriminating because that statement would be admissible against the witness at trial. But reiteration adds to credibility of the statement." United States v. Miranti, 253 F.2d 135, 139-40 (2d Cir. 1958). *See also* United States v. Malone, 111 F. Supp. 37, 39 (N.D. Cal. 1953). *Rogers* seems to imply that reiteration is never per se incriminatory, and the argument has been advanced that, if it were, it would prohibit a subsequent appearance by a witness before the same inquisitory tribunal. Ellis v. United States, 416 F.2d 791, 803 (D.C. Cir. 1969). A better proposition would seem to be that policy reasons favoring truthful and complete testimony at one proceeding, especially to avoid prejudice to any adverse parties, preclude the application of the fifth amendment privilege to reiteration of incriminating statements at the same proceeding.

[66] *See* text accompanying notes 36-38 *supra.*

[67] The case most illustrative of this problem is Singer v. United States, 244 F.2d 349 (D.C. Cir. 1957), in which a witness before the House Committee on Un-American Activities testified freely that he was a member of the Communist Party in the years following World War II, and that he supported its programs. Since Singer had admitted that the "assemblage" met regularly, that he was a member, and that they all knew the purposes of the Party, it is clear that he had fully incriminated himself within the meaning of the Internal Security Act of 1948, 18 U.S.C. § 2385 (1970). But the witness then refused to answer questions concerning the identity of other members of the group, claiming the fifth amendment privilege. Judge Miller, speaking for the court, argued that Singer had not fully incriminated himself since he had not admitted that the collection of individuals with whom he met constituted a "group" within the meaning of the statute.

Judge Miller went on to argue that Singer had waived his privilege against self-incrimination because naming nine hard-core Communists could in no way tend to further incriminate Singer, since their identities would not prove the assemblage to be a "group" within the meaning of the statute. Thus, according to Judge Miller, the witness had waived his privilege within the meaning of the first *Rogers* test of "no danger of further incrimination." This argument totally ignores the fact that the testimony of those nine individuals might prove the existence of such a "group" and would thus be incriminating. Hence, the court's strained logic in attempting to find a waiver with the *Rogers* doctrine of "no danger of further incrimination" is doubtful at best.

Chief Judge Edgerton, dissenting in *Singer*, used Counselman v. Hitchcock, 142 U.S. 547 (1892), for support in pointing out that the testimony of those nine persons might be enough extra evidence to convict Singer, and that there was a clear danger of further incrimination. Applying the *Rogers* test, that waiver occurs only when there is no possible danger of further incrimination, Judge Edgerton argued that in this case there could be no waiver.

The Supreme Court recently re-emphasized the importance of protection from the use of forced testimony to seek other evidence. Reiterating the conceptual validity of *Counselman*, the Court upheld a statute [18 U.S.C. §§ 6002-03 (1970)] which granted "derivative-use" immunity for a forced answer. Kastigar v. United States, 92 S. Ct. 1653 (1972). The reasoning of the dissent shows why the first *Rogers* test of "no danger of further incrimination," when realistically and conscientiously applied, will almost never result in a waiver of the privilege. The distorted arguments of the majority show the difficulty the lower courts have in attempting to find a waiver within the parameters of the first *Rogers* test.

[68] Although decided some years before *Rogers*, United States v. St. Pierre, 132 F.2d 837 (2d Cir. 1942), *cert. denied*, 319 U.S. 41 (1943) (*see* notes 18-23 *supra*, and accompanying text), is an excellent example of what actually happens in practice. There the witness had admitted the total crime but refused to name the victim. The court found a waiver by

The second possible *Rogers* theory—waiver occurs as to details of admitted facts—may be illustrated by an example in which the witness admits possession of marijuana but claims the privilege when asked "Where did you get it?" Under the second *Rogers* rule, his privilege has been waived with respect to the details of that admission, including his sources. In this example, policy arguments favoring full disclosure of the details of that admission apparently outweigh any concern for the witness' fifth amendment privilege, because the witness has voluntarily incriminated himself and should not be heard to complain of further incrimination arising from the details of a statement freely made.[69]

The reasoning behind the principle of waiver seems to be that once a witness has voluntarily passed a certain threshold of incrimination, he should not be allowed to stop but must go ahead and make a full disclosure, regardless of the danger of further incrimination. It is clear from the cases that this second *Rogers* rule has been regarded as the correct one.[70] Thus the correct interpretation of *Rogers* should be that when a witness voluntarily admits a fact which is an element of a crime, he waives his privilege against self-incrimination and is required to answer questions concerning the details of that admission regardless of any further incrimination.[71] This principle provides the maximum protection for a witness who honestly wishes to claim his privilege, and at the same time avoids the distortion caused by a partial disclosure.

In summary, *Arndstein* indicated that an admission of less than total guilt may not be sufficiently incriminating for that admission to constitute a waiver of the privilege. The *Rogers* decision went further and demonstrated that an admission of an element of a crime is sufficiently incriminating to be held a waiver.

Adversary Hearings. The general rule now seems established that an admission either of the total crime or merely of an element of a crime will be held a waiver of the privilege with respect to further questions concerning the details of that element or crime, but that an admission of anything less than an element will not waive the privilege. The general principle works well in an

ignoring the fact that the witness could not be prosecuted without the name of the victim and that forcing his answer would therefore tend to incriminate. Judge Frank, dissenting, pointed out the folly of this argument. 132 F.2d at 842-44. As in *St. Pierre*, the courts will generally require an answer when the social needs favoring waiver outweigh any significant additional incrimination of the witness, and generally ignore the fact that forcing the witness to answer does, in fact, further incriminate him. *See also* note 67 *supra.*

[69] The court in Foster v. People, 18 Mich. 266, 275 (1869), discussed an interesting argument in support of this theory: that the right to claim the privilege as to the slightly incriminatory details alone is derivative from the right not to incriminate oneself by admissions of guilt or elements of crime. Thus, once an admission is made concerning an element, the source of the privilege no longer exists with respect to the details of the element. "The right to decline answering as to these minor facts [referring to links in the chain of evidence needed to prosecute], is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offense is waived." *Id.*

[70] *See, e.g.*, Singer v. United States, 244 F.2d 349 (D.C. Cir. 1957); Tillotson v. Boughner, 238 F. Supp. 621 (N.D. Ill. 1965); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 329 (E.D. Wis. 1954).

[71] For a discussion in agreement with this interpretation see Noonan, *Inferences from the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 326 (1955).

inquisitory setting when there are no conflicting rights of adverse parties to consider. But if a witness in an adversary hearing admits a fact on direct examination and refuses to explain it on cross, the privilege comes into direct conflict with the rights of those who desire the withheld testimony.[72] Thus, in an adversary setting the privilege must be weighed against the rights of others to a full and fair disclosure of all relevant facts, and this balancing necessarily results in a broadening of the application of the waiver principle. There are three situations in which the privilege may be claimed (and subsequently waived) in an adversary setting: (1) when the defendant in a criminal case takes the stand in his own behalf; (2) when a party in a civil trial takes the stand; and (3) when an ordinary witness gives testimony in either a civil or criminal hearing.

Criminal Defendant. It is generally held that a defendant in a criminal trial cannot be forced to take the stand at all, and that neither the judge nor the prosecutor may comment on his failure to do so.[73] It is widely held that if a defendant chooses to take the stand in his own behalf (with knowledge of his right not to do so, and of his obligation to testify fully once he has[74]) he waives his right to invoke the privilege for any related purpose.[75]

When a criminal defendant takes the stand there are three categories of questions in response to which he might wish to invoke the privilege: (1) questions concerning the offense charged; (2) questions concerning his credibility as a witness; and (3) questions concerning matters unrelated to the offense or his credibility.

First, questions may be asked concerning the transaction for which he is on trial. It is generally held that by taking the stand in his own behalf, he has waived his right to invoke the privilege in response to any questions concerning the offense charged.[76] It is obvious that to force the defendant to answer such questions may incriminate him, but it is thought that any testimony voluntarily given by the defendant in his own behalf will cloud the facts to such an extent that he should be required to tell all. If he volunteers some relevant testimony beneficial to his cause, he should not be heard to complain of any that is not.

Second, the criminal defendant may be asked questions that are not directly related to the offense charged, but instead go to the collateral issue of credibility.

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[72] "[S]uch a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would . . . inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity." Foster v. People, 18 Mich. 266, 275 (1869).

[73] Griffin v. California, 380 U.S. 609 (1965); Wilson v. United States, 149 U.S. 60 (1893); United States *ex rel.* Shott v. Tehan, 337 F.2d 990 (6th Cir. 1964), *vacated*, 382 U.S. 406 (1966); United States v. Walker, 313 F.2d 236 (6th Cir.), *cert. denied*, 374 U.S. 807 (1963).

In a civil suit, however, comment and instructions as to negative inferences from the failure to testify are not prohibited by the fifth amendment. *E.g.*, Hansel v. Purnell, 1 F.2d 266, *cert. denied*, 266 U.S. 617 (1924); Grognet v. Fox Valley Trucking Service, 45 Wis. 2d 235, 172 N.W.2d 812 (1969); *see* 8 WIGMORE § 2272(e).

[74] For a discussion as to whether he may waive the privilege without knowledge or warning of his rights, *see* note 4 *supra*.

[75] Grunewald v. United States, 353 U.S. 391 (1957); Raffel v. United States, 271 U.S. 494 (1926). *See generally* 8 WIGMORE § 2276(2), at 459-69.

[76] 8 WIGMORE § 2276(2), at 459-69.

These questions will generally concern any prior convictions of the defendant.[77] Whether the defendant will be required to answer such questions may not be an issue of the fifth amendment privilege, however, since the defendant will generally already have been convicted of those crimes and it is well settled that there is no privilege absent a threat of criminal prosecution.[78] Generally, the fifth amendment would come into play when a question concerning the surrounding facts of a previous transaction might elicit admissions that could lead to a new conviction on another charge. This possibility is remote,[79] however, and it is therefore unlikely that the issue of waiver of the privilege (by assuming the stand) will ever arise as to questions concerning credibility.

Third, it is possible that questions might be asked the defendant that do not concern the charges against him, affect his credibility only remotely, and still require an answer that would tend to incriminate. In such a case, the defendant should be allowed to invoke the privilege.[80] A contrary rule, *i.e.*, finding a waiver in such a situation, seems totally irreconcilable with the reasoning behind the waiver principle.[81] In addition, it seems too high a price for a defendant to pay to have the chance to tell his own story.

In summary, when a criminal defendant takes the stand: (1) the fifth amendment privilege is waived with respect to questions concerning the transactions charged; (2) the privilege does not apply to questions dealing with his credibility unless there is some danger of future prosecutions; and (3) the privilege is not waived with respect to matters unrelated to the offense charged unless he admits an element of a crime.

Civil Party. In 1958 the Supreme Court, in *Brown v. United States*,[82] extended the criminal defendant waiver rule to the civil party situation, holding that a party who takes the stand in his own behalf waives the privilege with respect to any facts placed into issue. Mrs. Brown was a civil defendant in a denaturalization suit. On direct examination Mrs. Brown admitted membership in the Young Communist League from 1930 to 1935, but denied that she had any connection with the Communist Party between 1935 and her naturalization in 1946. She then swore that she had never advocated or taught the overthrow of the Government of the United States. On cross-examination the Government asked Mrs. Brown: "Are you now or have you ever been a member of the Communist Party of the United States?" She refused to answer,

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[77] *Id.*

[78] *See, e.g.*, Rogers v. United States, 340 U.S. 367, 372-73 (1951); Hoffman v. United States, 341 U.S. 479, 486 (1951).

[79] There is an argument that such a prosecution may even be barred by theories of res judicata or collateral estoppel. *See* Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954); Mayers & Yarbrough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960); Vestal & Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683 (1966).

[80] United States v. Haynes, 81 F. Supp. 63 (W.D. Pa. 1948), *aff'd*, 173 F.2d 223 (3d Cir. 1949), which is the only case found so holding. Apparently, however, there are no cases directly denying the privilege.

[81] The waiver of the privilege by a criminal defendant's taking the stand is based upon the idea that to allow the defendant to tell his part of the story would cloud the truth to such an extent that he should be required to tell all. *See* text accompanying note 76 *supra*. This purpose would in no way be furthered by requiring the defendant to answer questions concerning facts totally unrelated to the offense charged.

[82] 356 U.S. 148 (1958).

claiming that to do so might tend to incriminate her. It is significant that the answers freely given by Mrs. Brown did not incriminate her in any way, as Justice Frankfurter, writing for the majority, stated: "The testimony of petitioner in the present case admittedly did not amount to 'an admission of guilt or furnish clear proof of crime,' but was, on the contrary, a denial of any activities that might provide a basis for prosecution."[83] Under any previous theory of waiver Mrs. Brown would have been entitled to claim the privilege with respect to subsequent questions requiring an answer that might tend to incriminate. But the Supreme Court held, five to four, that she had waived her privilege by voluntarily putting her Communist activities into issue on direct examination.

Justice Frankfurter stated the opinion of the Court: "When a witness voluntarily testifies [he has the choice] not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice, but if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute."[84]

The effect of this decision is to place the civil party in almost the same position with respect to waiver of the privilege as the criminal defendant. If the civil party voluntarily takes the stand, his testimony (whether incriminating or not) will be held a waiver of the privilege for any other questions relevant to the issue involved. *Brown* invalidated the theory, accepted in prior cases, that mere denials of guilt are insufficient to cause a waiver of the privilege.[85]

It should be noted that the civil party who testifies in his own behalf is not an ordinary witness in several respects.[86] An ordinary witness, unlike the defendant in *Brown* who took the stand voluntarily, may not refuse to answer a subpoena and must take the stand. The ordinary witness decides whether to waive the privilege at the time he is asked a question that incriminates, but a civil party, like a criminal defendant, must make the decision before taking the stand at all.

It should also be noted that the waiver effected by the civil party, unlike that of the criminal defendant, extends only to questions related to the matters placed into issue by the direct examination. The privilege is not waived as to matters unrelated to the direct testimony, such as credibility.[87]

It is questionable whether the *Brown* rule of waiver achieves a desirable

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[83] *Id.* at 154.

[84] *Id.* at 155-56.

[85] Isaacs v. United States, 256 F.2d 654 (8th Cir. 1958); Ballantyne v. United States, 237 F.2d 657 (5th Cir. 1956); United States v. Costello, 198 F.2d 200 (2d Cir. 1952); United States v. Weisman, 111 F.2d 260 (2d Cir. 1940); United States v. Hoag, 142 F. Supp. 667 (D.D.C. 1956); People *ex rel.* Taylor v. Forbes, 143 N.Y. 219, 38 N.E. 303 (1894) (cited with approval in McCarthy v. Arndstein, 262 U.S. at 359). These decisions may have been overruled by *Brown* with respect to civil parties in adversary proceedings, but should be valid as to ordinary witnesses or inquisitory settings.

[86] A party in a civil suit may be called as an adverse witness. *E.g.*, FED. R. CIV. P. 43(b). When he is so called, the rules of waiver applicable to an ordinary witness (*see* text accompanying notes 89-97 *infra*) should apply. Brown v. United States, 356 U.S. 148 (1958). (The civil defendant was initially called as adverse witness and was allowed to invoke the privilege while denying guilt. After taking the stand as a voluntary witness, however, new rules of waiver were applied.)

[87] Brown v. United States, 356 U.S. 148 (1958); *cf.* United States v. Haynes, 81 F. Supp. 63 (W.D. Pa. 1948), *aff'd*, 173 F.2d 223 (3d Cir. 1949).

result. The price the civil party must pay for the right to tell his side of the story is the surrender of all fifth amendment privileges with respect to the entire transaction, whether his testimony is incriminating or not. Any time the transactions underlying the civil cause of action may include subsequent criminal prosecution,[88] the civil defendant is effectively discouraged from taking the stand in his own behalf. A contrary rule, allowing the invocation of the privilege by a civil party who has not admitted an element of a crime, would seem to better further the policies behind the fifth amendment, while encouraging parties to testify in their own behalf. If the partial testimony prejudices an opposing party to an unacceptable extent, the remedy would be for the court to strike the direct testimony, or grant a motion for a mistrial.[89]

The *Brown* decision seems to be an unnecessary extension of the criminal defendant waiver rule to the civil party situation, and should not be extended beyond the facts of the case itself.

Ordinary Witness. Our system of adversary justice is predicated on the theory that the truth will best be known if both parties are given ample opportunity to cross-examine each other's witnesses.[90] Unlike a witness who is also a party in a civil action, the ordinary witness may testify to a transaction on direct examination and then refuse to explain by asserting the fifth amendment privilege on cross-examination.[91] The privilege then comes into direct conflict with the right to cross-examine, which is no less important in civil than in criminal proceedings[92] as an integral part of our adversary system of justice.[93]

The determination of what level of incrimination is necessary for an admission on direct to constitute a waiver on cross-examination is inexorably related to the opposing party's right to cross-examination on the matters given in evidence on direct. It is clear that the privilege may be claimed and sustained on cross-examination,[94] especially if there is no relationship between the admissions on direct and the questions asked on cross-examination.[95]

If fact *A* and fact *B* are related, and the ordinary witness admits fact *A* on direct but claims the privilege against self-incrimination with respect to fact *B* on cross-examination, there are several possible solutions, depending on the levels of incrimination of both facts. If fact *A* is not incriminating and fact *B* is, the witness should be allowed to claim his privilege. If fact *B* is not incriminating at all, the witness has no privilege and must answer. But if fact *A* and fact *B* are both incriminating, then the issue is more difficult. If fact *A*

[88] This is often the case in suits concerning stock fraud, anti-trust, bankruptcy, and denaturalization. *E.g.*, Brown v. United States, 356 U.S. 148 (1958).

[89] *See* note 97 *infra.*

[90] Montgomery v. United States, 203 F.2d 887 (5th Cir. 1953).

[91] Brown v. United States, 356 U.S. 148 (1958), discussed in text accompanying notes 82-89 *supra.*

[92] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

[93] Grant v. United States, 368 F.2d 658 (5th Cir. 1966).

[94] United States v. Toner, 173 F.2d 140 (3d Cir. 1949).

[95] *Id. See also* Semler v. United States, 332 F.2d 6 (9th Cir.), *cert. denied*, 379 U.S. 831 (1964), and Coil v. United States, 343 F.2d 573 (8th Cir.), *cert. denied*, 382 U.S. 821 (1965), in which it was held that the privilege may be claimed with respect to matters on cross-examination which were not covered on direct and which went only to credibility. But for weak dicta that cross-examination regarding credibility should not be so limited, see United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968).

is an element of a crime and fact *B* is only a detail of fact *A*, the witness should be forced to answer.[96] But if fact *A* is not sufficiently incriminating as to be an element of a crime and fact *B* is incriminating, the witness should be allowed to claim his privilege with respect to fact *B*, since his admission on direct was not sufficiently incriminating as to constitute a waiver of the privilege.

If the claim of privilege on cross-examination is sustained by the court and the opposing party is denied his right to cross-examine, a motion to strike that part of the direct testimony related to the claim of privilege is the ordinary remedy for the opposing party.[97] It is for the trial judge to determine whether the opposing party's injury is sufficient to support a motion to strike the direct testimony, or in the alternative, for a mistrial.[98]

IV. SUMMARY

This Comment has analyzed the entire spectrum of problems that can be encountered when dealing with the level of incrimination necessary to waive the fifth amendment privilege, and has attempted to set out the standards that are suggested by the cases in this field. In summary, the areas discussed are outlined along with any conclusions reached and any rules that have been defined.

A. *Assertion of the Privilege*

Necessary Level of Incrimination. Almost any possibility that an answer might tend to incriminate is sufficient to allow the witness to assert his privilege.

How Determined. First, the witness must claim the privilege by refusing to answer. Then the court determines whether there is any possibility that the answer might incriminate, using the standard outlined above. If the court is mistaken and requires an answer that does incriminate, then the witness is protected from the use of that testimony (or any evidence secured as a result of it) against him at any subsequent proceeding.

B. *Double Standard of Incrimination*

The level of incrimination of an answer necessary for a witness to assert the privilege in the first instance is different from the level of incrimination

[96] Rogers v. United States, 340 U.S. 367 (1951).

[97] If on direct a witness testifies to incriminating matters, he is considered to have waived the privilege as to those matters and may not, on cross, decline to answer questions as to the details of the matters he has already revealed . . . . However, if the testimony sought to be elicited on cross is not merely a more detailed inquiry into matters as to which the witness has already waived his right, the witness may invoke the privilege.

Where the privilege is legitimately invoked by a witness during cross-examination, all or part of that witness' direct testimony may be subject to a motion to strike.

Fountain v. United States, 384 F.2d 624, 627-28 (5th Cir. 1967). *See also* United States v. Toner, 173 F.2d 140 (3d Cir. 1949); United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968). If the court feels the direct testimony is so prejudicial that striking it from the record and giving instructions to disregard are inadequate remedies, it would seem that the trial court could, within its discretion, grant a motion for mistrial.

[98] Grant v. United States, 368 F.2d 658 (5th Cir. 1966); Dixon v. United States, 333 F.2d 348 (5th Cir. 1964). *See also* note 97 *supra.*

necessary for the witness to waive his privilege by answering. The level of incrimination of an admission necessary for a waiver is much higher than that for an assertion of the privilege.

C. *Level of Incrimination Necessary for an Answer To Waive the Privilege*

Inquisitory Proceedings. Admissions of an element of a crime (or of the total crime) will waive the privilege with respect to further questions concerning the details of that element (or crime), but the privilege may be claimed with respect to any questions that are not details of that element.

Adversary Proceedings. Differing standards prevail depending on the application to a criminal defendant, a civil party, or an ordinary witness.

Criminal Defendant. Once the criminal defendant takes the stand, he may not claim the privilege with respect to any questions relevant to the transactions related to the crime charged. He is deemed to have waived his privilege by the act of taking the stand.

The criminal defendant may be asked questions concerning activities which go to the issue of his credibility as a witness. He may not claim the privilege with respect to transactions for which he has already been tried (whether convicted or acquitted) unless there is a realistic possibility of a future prosecution arising from that same transaction.

Generally, the criminal defendant will not be asked questions that are not related either to the crime for which he is charged, or the issue of his credibility as a witness. But if he is asked such a question, and if there is a possibility of incrimination arising from an answer, he should be allowed to claim the privilege. However, if he has already answered some questions concerning those unrelated matters, and has admitted an element of a crime, then he has waived his right to plead the fifth with respect to questions concerning the details of the element admitted.

Civil Party. By voluntarily taking the stand, a civil party waives his fifth amendment privilege with respect to any facts (whether incriminating or not) voluntarily placed into issue which are related to the matters in controversy. In the opinion of the author, this is an unsatisfactory rule and it is submitted that a civil party should be treated as an ordinary witness. When the civil party is called as adverse witness, the rules of an ordinary witness should apply and the civil party called by his opponent should be held to have waived his privilege only if his answers constitute an element of a crime.

Ordinary Witnesses. The witness who takes the stand will waive his fifth amendment privilege when he admits an element of a crime. If he places a fact into issue which is less than an element and then claims the privilege on cross-examination, the injured party should move to strike the partial testimony, or in the alternative, for a mistrial.